

SERVED: July 17, 1992

NTSB Order No. EA-3618

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 1st day of July, 1992

_____	)	
BARRY LAMBERT HARRIS,	)	
Acting Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-9625
v.	)	
	)	
LEO M. KISCADEN,	)	
	)	
Respondent.	)	
_____	)	

**OPINION AND ORDER**

The Administrator has appealed from the oral initial decision issued by Administrative Law Judge Joyce Capps on July 11, 1989.<sup>1</sup> The law judge dismissed the Administrator's order, granting a motion made by respondent at the conclusion of the Administrator's case-in-chief. We reverse the initial decision and remand the case for further proceedings.

---

<sup>1</sup>A copy of the initial decision, an excerpt from the transcript, is attached. Respondent has not replied to the appeal.

The Administrator's order, filed as the complaint, suspended respondent's private pilot certificate for 60 days alleging that, on August 31, 1987, he had operated under visual flight rules ("VFR") within a control zone (the zone around the non-tower airport at DuBois, PA), without receiving an appropriate air traffic control clearance, and when the visibility within the control zone was less than the minimum 3 miles required by § 91.105(a) of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 91). Respondent was also charged with violating § 91.9, the FAR provision that prohibits careless or reckless operation of an aircraft.<sup>2</sup>

The law judge found (Tr. at 68) that respondent was proceeding on a VFR flight. When he landed the aircraft at DuBois, visibility was between 1 1/2 and 2 1/2 miles, and the weather required IFR.<sup>3</sup> Thus, respondent was found to have

---

<sup>2</sup> FAR § 91.105, Basic VFR weather minimums (now § 91.155) as relevant here, reads:

(a) Except as provided in §91.107 [Special VFR weather minimums], no person may operate an aircraft under VFR when the flight visibility is less, or at a distance from clouds that is less, than that prescribed in the following table:

<u>Altitude</u>	<u>Flight visibility</u>
1,200 feet or less above the surface -	
Within controlled airspace	3 statute miles

§91.9, Careless or reckless operation, reads:

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

<sup>3</sup>Instrument Flight Rules.

violated that aspect of subsection 105(a) prohibiting VFR operations during such periods. Nevertheless, the law judge dismissed the complaint because she also found that another aspect of proof was missing: that respondent was in controlled airspace. She found from the testimony that controlled airspace in the vicinity of the airport began at 700 feet, yet there was no evidence in the record to indicate that respondent had exceeded that altitude.

The Administrator's appeal indicates that, in fact, he made a prima facie case. The law judge's confusion is not surprising, however, as critical definitions of the applicable regulations, and their import, were not provided by the Administrator, and testimony at odds with the regulations and other evidence was introduced. In-depth knowledge of the FAR was required in order to comprehend that the testimony, overall, was sufficient to meet the Administrator's burden.<sup>4</sup>

Matters would have been greatly simplified if the Administrator's counsel had noted that the FARs define two terms: "controlled airspace," the term used in subsection 105(a), and "control zone." The majority of the testimony used the latter term. Control zone is a type of controlled airspace. 14 C.F.R.

---

<sup>4</sup>Although the Administrator would not be permitted, on appeal, to rectify evidentiary failures, these are matters of law, not fact, and therefore are not implicated in the question of whether the motion to dismiss was properly granted for failure to make a prima facie case. Prima facie evidence is a question of fact. It is that factual evidence that is sufficiently strong for his opponent to be called upon to answer it. A prima facie case has been made if there is sufficient proof to support a sought finding, disregarding evidence to the contrary.

1.1. A control zone, as the Administrator now notes in his appeal, is defined at 14 C.F.R. 71.11 as "controlled airspace which extends upward from the surface of the earth."

Exhibit A-1, a sectional map including the involved area, shows (by legend and corresponding blue dotted line) that the airport and its environs are within a control zone.<sup>5</sup> The Administrator's witness Whitney testified that, from the point at which he first observed the aircraft, it was within the control zone. Tr. at 17. Exhibit A-2 also illustrates the control zone and the aircraft's position.

Matters became more confused when the Administrator's other witness later testified that the relevant control zone began at approximately 700 feet above the surface. Tr. at 61. It was this testimony that convinced the law judge that placing the respondent's aircraft above 700 feet was critical to the Administrator's case. As the Administrator now notes, citing 14 C.F.R. 71.13 and Exhibit A-1's legend (Appeal at 13-14), this testimony confused control zones with "transition areas," which are defined in terms of 700 feet minimum altitude. These transition areas are irrelevant to the Administrator's case. This witness, Mr. Shuman, also testified that an aircraft at this location would not be within controlled airspace unless it was above 700 feet (Tr. at 65), again reflecting his misunderstanding

---

<sup>5</sup>This exhibit was the sectional chart in effect in October 1988. The record establishes, however, that no relevant changes had been made, as compared to the chart that was in effect on August 31, 1987, the date of the incident.

of terminology and producing another error that may have contributed to the law judge's decision.

In view of the relevant definition, having introduced testimony to locate respondent's aircraft within the control zone, the Administrator, in fact, presented sufficient evidence to meet the requirement that he present a prima facie case. That he also introduced contradictory evidence that reflected a misunderstanding of the regulations and of Exhibit A-1 is regrettable, but this inaccurate evidence does not erase the Administrator's other evidence. Instead, as the Administrator argues, the Board must look at the evidence as a whole, and in the light most favorable to complainant.<sup>6</sup> Doing so, there is no doubt that the Administrator has presented a prima facie case, and respondent should be called upon to answer.<sup>7</sup>

---

<sup>6</sup>See footnote 4, supra. We cannot see what contribution Administrator v. Interair Services Inc., 3 N.T.S.B. 2326 (1980) and Administrator v. Simonye, 4 NTSB 159 (1982), can make to this analysis. Neither stands for the proposition for which the Administrator cites it, and the citation to Simonye is incorrect.

<sup>7</sup>Although the law judge had no need to address the matter, we agree with the Administrator that, in view of the testimony regarding potential endangerment, the Administrator also made a prima facie case for the alleged § 91.9 violation.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;
2. The initial decision is reversed; and
3. This matter is remanded for further proceedings consistent with this opinion.

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.